

MD BIOMEDICAL ENGINEERING (M) SDN BHD**v. GOH YONG KHAI**

COURT OF APPEAL, PUTRAJAYA

LAU BEE LAN JCA

RAVINTHRAN PARAMAGURU JCA

LEE HENG CHEONG JCA

[CIVIL APPEAL NO: Q-02(IM)(NCVC)-2524-12-2018]

16 MARCH 2021

CIVIL PROCEDURE: *Damages – Assessment of damages – Action pursuant to wrongful entry of caveat – Whether damages already awarded – Claim for legal fees and disbursement – Whether included – Whether recoverable – Whether ‘total legal fees and disbursements’ fell within meaning of ‘tortious damage’ and ‘foreseeability test’ – Whether claim for legal fees not too remote – Whether ‘actual damage’ suffered to protect interest in land – Whether claim fell within scope of compensatory head under s. 179 of Land Code (Sarawak) (Cap 81)*

WORDS & PHRASES: *‘such compensation as may be just’ – Land Code (Sarawak) (Cap 81), s. 179 – Whether proof of actual loss was sole conclusive determinant of ‘such compensation as may be just’ – Whether confined to real, actual and possibly direct damage – Claim for legal costs and disbursements in application for removal of caveats – Whether ‘actual damage’ suffered to protect interest in land – Whether fell within scope of compensatory head under s. 179*

The issue in this appeal was whether the plaintiff could recover against the defendant, in full, the legal fees and disbursements of RM70,000 paid to its advocates and solicitors as damages by way of an indemnity under the assessment of damages proceeding arising from the removal of a private caveat. The High Court Judge dismissed the plaintiff’s claim for the legal fees and disbursements after the hearing of the assessment of damages on the grounds that: (i) the costs of RM5,000 was previously awarded to the plaintiff when the defendant’s caveat was removed by the High Court. The assessment damages was confined to the assessment of the plaintiff’s loss and damages and not the claim for legal fees and disbursements incurred by the plaintiff; and (ii) that the plaintiff had not shown that it had sustained any damages due to wrongful caveat lodged by the defendant.

Held (allowing appeal with costs)**Per Lee Heng Cheong JCA delivering the judgment of the court:**

(1) Damages under s. 329(1) of the National Land Code must be assessed in accordance with the principles in the law of torts and that would be the reasonable foreseeability test. Thus, damages are recoverable if it falls within the range of damages recoverable in law, and if the damages are not too remote. The costs of RM5,000 awarded by the High Court when the plaintiff’s application for removal of caveat was allowed, was only in respect of the legal costs of that application and did not include the plaintiff’s claim for legal fees and disbursements under this

- A originating summons for assessment of damages. The plaintiff's claim for 'total legal fees and disbursements of RM70,000 came within the meaning of 'the tortious damage' and the 'foreseeability test' and the claim for the legal fees was not too remote. (paras 20, 26 & 29)
- B (2) A caveator is liable to pay damages that the claimant has sustained or suffered as a result of the entry of a wrongful caveat on the subject land. When a defendant lodged a caveat against the lands wrongfully, the plaintiff, as the registered proprietor, would be forced to take out legal action to defend and protect his legitimate interest and, in doing so, would incur legal costs. The plaintiff would not be constrained to incur the expenses if not for the defendant's entry of wrongful caveats against the lands. (paras 23, 30 & 32)
- C (3) Section 179 of the Land Code (Sarawak) (Cap 81) ('Land Code') does not impose that the proof of actual loss was the sole conclusive determinant of 'such compensation as may be just'. 'Such compensation as may be just' in the section is not confined to real, actual and possibly direct damage, as the wordings in the section is wide enough to cover the legal fees and disbursements incurred in removing the caveat lodged against the lands. Therefore, a claim for legal costs and disbursements involved in the application for the removal of caveats was within the scope of a compensatory head under s. 179 of the Land Code. Further, the evidence that the total legal fees of RM70,000 incurred by the plaintiff and paid to its advocates and solicitors was not disputed or challenged by the defendant during his cross-examination. Hence, the plaintiff's payment of legal fees amounting to RM70,000 was 'actual damage' suffered by the plaintiff in order to remove and protect his interest in the lands and this was legitimately one of the heads of damages which an aggrieved person such as the plaintiff may claim. (paras 31 & 33-35)
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Case(s) referred to:

- G *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309 FC (*refd*)
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA (*refd*)
Lo Foi v. Lee Ah Hong & Ors [1998] 1 CLJ Supp 244 HC (*refd*)
Ming Holdings (M) Sdn Bhd v. Syed Azahari Noh Shahabudin & Anor [2010] 6 CLJ 857 FC (*refd*)
Ting Sieh Chung v. Hock Peng Realty Sdn Bhd [2012] 1 LNS 574 CA (*refd*)

H **Legislation referred to:**

Land Code (Sarawak) (Cap 81), s. 179
National Land Code, s. 329(1)

For the appellants - Rajesh Jethi; M/s Jethi & Assocs

For the respondent - David Siaw Ting Cheng; M/s David Siaw & Co Advoc

- I [Editor's note: Appeal from High Court, Miri; Originating Summons No: MYY-24NCVC-73-10-2017 (HC) (overruled).]

Reported by S Barathi

JUDGMENT

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Lee Heng Cheong JCA:**Introduction**

[1] This is an appeal by the appellant/plaintiff against the learned High Court Judge's ("the learned HCJ") decision which made no award for damages and no order for costs after the hearing of the appellant's application for assessment of damages based on wrongful entry of caveats against two pieces of land ("the lands") by the respondent/defendant.

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[2] For ease of reference, parties will be referred to as they were in the proceedings before the High Court.

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The Salient Facts

[3] Pursuant to the order of the High Court made on 12 March 2018, removing the defendant's caveat wrongfully lodged on the plaintiff's lands, the plaintiff filed this originating summons for assessment of damages against the defendant which was conducted by the learned HCJ on 23 August 2018.

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[4] During the hearing of the plaintiff's assessment of damages, the plaintiff called only one witness namely Mr Goh Yong Meng (PW1) whereas the defendant elected not to call any witness.

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[5] It is undisputed that through Mr Goh Yong Meng's (PW1) evidence, the plaintiff only sought to recover the total legal fees and disbursements of RM70,000 incurred by it and paid to its advocates and solicitors, Messrs Jethi & Associates, Miri as damages against the defendant.

Findings Of The High Court

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[6] The learned HCJ dismissed the plaintiff's claim for legal fees and disbursements after the hearing of the assessment of damages on two main grounds namely:

- (i) that the costs of RM5,000 was previously awarded to the plaintiff when the defendant's caveat was removed by the High Court on 12 March 2018. The assessment of damages was confined to the assessment of the plaintiff's loss and damages and not the claim for legal fees and disbursements incurred by the plaintiff; and
- (ii) that the plaintiff had not shown that it had sustained any damages due to wrongful caveat lodged by the defendant. There was no evidence to prove that the plaintiff had sustained any damages due to the loss in the value of the lands in question or any evidence of dealings or intention to deal with the lands which were the subject matter of the defendant's caveat earlier, as such the court made no award for damages and costs of the proceedings.

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A The Plaintiff's Contentions Before This Court

[7] The plaintiff contended that based on the unchallenged evidence of PW1, the total sum of RM70,000 has been actually incurred by the plaintiff and duly paid to its advocates, Messrs Jethi & Associates as the legal fees and disbursements for the removal of caveat and assessment of damages' applications and that it is both reasonable and foreseeable to allow the plaintiff's claim for the full reimbursement of the sum of RM70,000 against the defendant.

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[8] The sum of RM70,000 has actually been incurred by the plaintiff and it is only fair that the defendant be made to pay what is reasonably foreseeable. Further, the High Court had allowed the claim for legal fees and reimbursement on a solicitor-client basis.

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[9] The plaintiff further contended that the sum of RM5,000 was ordered by the High Court when the plaintiff's application for removal of the defendant's caveat was allowed by the High Court on 12 March 2018. This sum must be treated differently from the sum of RM70,000 claimed by the plaintiff on a full indemnity basis because the sum of RM5,000 was awarded as costs following the plaintiff's successful application for removal of the defendant's caveat whereas the sum of RM70,000 is claimed on a solicitor-client basis.

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The Defendant's Contentions Before This Court

[10] The defendant contended that there is no evidence to prove that the plaintiff has sustained damage based on an acceptable calculation of loss in value in respect of the lands as a result of the wrongful entry of caveats. Furthermore, upon PW1 being cross-examined by the defendant's counsel, to show the evidence in his witness statement and/or the plaintiff's bundle of documents of actual loss of value or damage for the lands as a result of the wrongful caveats, PW1 was not able to show any evidence at all.

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[11] Further, the defendant submitted that the plaintiff was not able to adduce any concrete evidence whether in writing or otherwise, for example, an official valuation of the lands, any offer in writing to purchase the lands by outside parties or negotiation in writing by serious outsiders in respect of the lands, to show actual loss in value in the lands actually sustained by the plaintiff.

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[12] The defendant also complained that the sum of RM50,000, being legal fees for a simple removal of caveat application is too exorbitant and unrealistic where there is no novelty or special skills involved and/or a complexity of laws to be researched. Furthermore, the High Court had already awarded costs of RM5,000 to be paid to the plaintiff for the removal of caveat application. Similarly, the sum of RM20,000 allegedly paid for the present hearing on assessment of damages is too expensive and most unreasonable as again there is no specialised skills or novelty or complexity

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of laws involved and as the applicable laws and/or precedents are very straightforward to any claim for damages for wrongful caveat. Furthermore, there was no cause papers exchanged between the opposing parties at all.

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[13] The plaintiff has adopted a totally wrong court procedure as a claim for legal costs was never envisaged as a compensatory head under s. 179 of the Land Code (Sarawak) (Cap 81).

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The Law

[14] It is trite law that the specific finding of facts by the learned HCJ as a trier of facts should not be disturbed by an appellate court such as this court herein unless that finding was plainly wrong: see *Ming Holdings (M) Sdn Bhd v. Syed Azahari Noh Shahabudin & Anor* [2010] 6 CLJ 857; [2010] 4 MLJ 577 (FC) paras 41 to 48.

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[15] We were mindful of the limited role of the appellate court in relation to findings of facts made by the court of first instance. In the case of *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97 where the Court of Appeal held as follows:

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... an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. **But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence.** (emphasis added)

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[16] Reference is also made to the decision of the Federal Court in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309 where the Federal Court held that the test of “insufficient judicial appreciation of evidence” adopted by the Court of Appeal was in relation to the process of determining whether or not the trial court had arrived at its decision or findings correctly on the basis of the relevant law and the established evidence.

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[17] Section 179 of the Land Code (Sarawak) (Cap 81) provides for the consequences of entering a caveat without reasonable cause. It merits reproduction as follows:

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Person entering caveat without cause

179(1) **Any person lodging any caveat without reasonable cause shall be liable to make to any person who may have sustained damage thereby such compensation as may be just.**

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(2) Such compensation as is referred to in subsection (1) shall be recoverable in an action at law by the person who has sustained damage from the person who lodged the caveat.

(emphasis added)

[18] Section 179 is substantially equipollent to s. 329(1) of the National Land Code which reads:

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Compensation for wrongful caveats, and limitation on repealed applications

- A 329(1) *Any person or body who, wrongfully or without reasonable cause, secures the entry of, or fails to withdraw, any private caveat shall be liable to pay compensation to any person or body who thereby suffers any damage or loss.*

(emphasis added)

- B [19] The Court of Appeal in *Ting Sieh Chung v. Hock Peng Realty Sdn Bhd* [2012] 1 LNS 574; [2013] 2 MLJ 90 held as follows:

- C It is settled law that ‘actual damage’ is actually one of the heads of damages which an aggrieved person such as the appellant in the present case could claim. *Section 179 of the Sarawak Land Code*, which is substantially equipollent to s. 329 of the National Land Code, *does not expressly or by necessary implication preclude or prohibit the plaintiff from claiming for damages, loss of profits or sale at a lower price so long as there was evidence to prove the damages or loss, arising from the entry of the caveat without reasonable cause*

(emphasis added)

- D [20] In *Lo Foi v. Lee Ah Hong & Ors* [1998] 1 CLJ Supp 244, Abdul Malik Ishak J (as he then was) held that damages under s. 329(1) of the National Land Code must be assessed in accordance with the principle in the law of torts and that would be the reasonable foreseeability test. Thus, damages would be recoverable if they come within the range of damages recoverable in law, and if they are not too remote. On the facts of this case, the learned judge upheld the decision of the learned Registrar in allowing the claim of RM2,000, which was the legal fees incurred to get the caveat removed.

Findings Of This Court

- F [21] Bearing in mind the above principles, we will now deal with the plaintiff's appeal.

- G [22] The sole issue to be determined in this appeal is whether the plaintiff can recover against the defendant, in full, the legal fees and disbursements of RM70,000 paid to its advocates and solicitors as damages by way of an indemnity under the assessment of damages proceeding arising from the removal of a private caveat.

[23] It is trite law that a caveator is liable to pay damages that the claimant has sustained or suffered damage, as a result of the wrongful caveat being entered on the subject land.

H Evidence Of PW1

[24] The plaintiff through PW1, tendered the following evidence to support its claim for legal fees and disbursements of RM70,000 paid to its lawyers namely, Messrs Jethi & Associates:

- I (i) the plaintiff's warrant to act and retainer dated 4 October 2017 (exh. P2) showing the agreed legal fees of RM70,000 (namely RM50,000 for removal of caveat and RM20,000 for assessment of damages);

- (ii) Messrs Jethi & Associates' Legal Bill No: M01/10/2017 dated 4 October 2017 (exh. P3) showing the sum of RM70,000 for the applications for removal of caveat and assessment of damages; A
- (iii) PW1's Public Bank Bhd cheque no: 657271 for the sum of RM15,000 (exh. P4); B
- (iv) Messrs Jethi & Associates' official receipt issued to the plaintiff No. 0147 dated 23 October 2017 for the sum of RM15,000 (exh. P5); B
- (v) PW1's Public Bank Bhd cheque no: 767875 for the sum of RM20,000 (exh. P6);
- (vi) Messrs Jethi & Associates' official receipt issued to the plaintiff No. 0149 dated 10 January 2018 for the sum of RM20,000 (exh. P7); C
- (vii) PW1's Public Bank Bhd cheque no: 666277 for the sum of RM15,000 (exh. P8);
- (viii) Messrs Jethi & Associates' official receipt issued to the plaintiff No. 0150 dated 23 March 2018 for the sum of RM15,000 (exh. P9); D
- (ix) PW1's Public Bank Bhd cheque no: 767890 for the sum of RM20,000 (exh. P10); and
- (x) Messrs Jethi & Associates' official receipt issued to the plaintiff No. 0201 dated 5 April 2018 for the sum of RM20,000 (exh. P11). E
- [25]** During PW1's cross-examination, it is noted that the defendant's counsel questioned him on two main issues relating to the plaintiff's claim for reimbursement of the full legal fees incurred by the plaintiff namely:
- (i) whether the costs of RM5,000 awarded by the High Court when the plaintiff's application for removal of caveat was allowed by the court on 12 March 2018, included all the plaintiff's claim for legal fees and disbursements under this action to which PW1 disagreed and answered "No" (see p. 10 of the notes of proceedings ("NOP")); and F
- (ii) whether he voluntarily paid the excessive legal fees of RM70,000 to the its advocates and solicitors to which PW1 agreed (see p. 11 of the NOP). G
- [26]** We are of the considered opinion that the costs of RM5,000 awarded by the High Court when the plaintiff's application for removal of caveat was allowed by the court on 12 March 2018, is only in respect of the legal costs of that application and does not include the plaintiff's claim for legal fees and disbursements under this originating summons for assessment of damages. H
- [27]** The defendant sought to argue that the damages suffered by the plaintiff arising from the entry of the wrongful caveat must be real, actual and possibly direct damage and that the burden is on the plaintiff to prove that he has sustained such real, actual and possibly direct damage due to the said wrongful lodgement of caveat. I

A [28] In *Lo Foi v. Lee Ah Hong & Ors (supra)* the court there also held
“damages under s. 329(1) of the National Land Code must be assessed in
accordance with the principles of the laws of torts and that would be the
reasonable foreseeability test” and “damages sought for would only be
recoverable if they come within the range of damages recoverable in law and
secondly, if they are not too remote”.
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[29] We are in full agreement with the above principles laid down in
Lo Foi v. Lee Ah Hong & Ors and applying such principles to the instant
appeal, we find that the plaintiff’s sole claim for “total legal fees and
disbursements of RM70,000” comes within the meaning of “the tortious
damage” and the “foreseeability test” as defined by *Lo Foi v. Lee Ah Hong
& Ors supra* and that the claim for the legal fees is not too remote.
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[30] The defendant ought to know that if he lodged a caveat against the
lands wrongfully, the plaintiff as the registered proprietor would be forced
to take out legal action, to defend and protect his legitimate interests in the
same and in doing so, would incur legal costs.
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[31] As regard the defendant’s contention that there is no concrete evidence
whether in writing or otherwise, in the form of an official valuation of the
lands, any offer in writing to purchase the lands by outside parties or
negotiation in writing by serious outsiders in respect of the lands, to show
actual loss in value in the lands actually sustained by the plaintiff to prove
that the plaintiff has sustained damage as a result of the wrongful entry of
caveats, we are of the respectful opinion that s. 179 of the Land Code
(Sarawak) (Cap 81) does not impose such a legal straightjacket in which proof
of actual loss as alleged by the defendant was the sole conclusive determinant
of “such compensation as may be just” as is stipulated in s. 179 of the Land
Code (Sarawak) (Cap 81). “Such compensation as may be just” is not
confined to real, actual and possibly direct damage as contended, as the
wordings of s. 179 of the Land Code (Sarawak) (Cap 81) is wide enough to
cover the legal fees and disbursements incurred in removing the caveat
lodged against the lands.
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[32] Had the defendant not lodged the caveat against the lands, the plaintiff
would not have to expend legal expenses to protect and safeguard its
legitimate interests in the lands. These are expenses which the plaintiff was
constrained to incur if not for the defendant’s entry of wrongful caveats
against the lands.
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[33] In so far as the defendant’s submission that the plaintiff has adopted
a totally wrong court procedure as a claim for legal costs was never envisaged
as a compensatory head under s. 179 of the Land Code (Sarawak) (Cap 81),
for the reason given above, we hold that a claim for legal costs and
disbursements involved in the application for the removal of caveats is
within the scope of a compensatory head under s. 179 of the Land Code
(Sarawak) (Cap 81).
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[34] Having distilled the principles from the aforesaid authorities and in the light of the above evidence, we are of the respectful view that PW1's above evidence clearly shows that the total legal fees of RM70,000 was incurred by the plaintiff and which sum was duly paid by PW1 on the plaintiff's behalf to its advocates and solicitors. PW1's evidence on the amount of legal fees paid, was not disputed or challenged by the defendant during his cross-examination.

[35] In any event, we are of the view that the plaintiff's payment of legal fees amounting to RM70,000, is "actual damage" suffered by the plaintiff in that the plaintiff had to incur this sum to remove and protect his interests in the lands and this is legitimately one of the heads of damages which an aggrieved person such as the plaintiff herein may claim. Section 179 of the Land Code (Sarawak) (Cap 81) and similarly s. 329(1) of the National Land Code do not expressly or by necessary implication preclude or prohibit the plaintiff from claiming for legal fees and disbursements incurred, removing a caveat other than for damages, loss of profits or sale at a lower price so long as there is evidence to prove that the damages or loss, arising from the entry of the caveat without reasonable cause, as in the instant appeal.

[36] In so far as the defendant's contention that the legal fees amounting to sum of RM70,000 is exorbitant and unreasonable, we find that there was no rebuttal evidence adduced by the defendant, other than a mere challenge and denial.

Conclusion

[37] Premised on the reasons enumerated above, we find that there are merits in the appeal. The appeal is hereby allowed with costs and the decision of the High Court dated 18 October 2018 is set aside.

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